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No. 02-1404

In The
Supreme Court of the United States

THE CITY AND COUNTY OF SAN FRANCISCO, ITS MAYOR, BOARD OF SUPERVISORS, AND CITY ATTORNEY; THE CITY OF SANTA MONICA, ITS MAYOR, CITY COUNCIL, AND CITY ATTORNEY,

Petitioners,

v.

THE BANK OF AMERICA; WELLS FARGO BANK N.A., CALIFORNIA FEDERAL BANK, AND THE CALIFORNIA BANKERS ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

California Federal's brief opposing certiorari is based on a factual misstatement regarding what the cities' ordinances do, and raises a new argument, never reached by the Ninth Circuit, that in itself shows why certiorari is necessary in this case.

Throughout its brief, California Federal argues that the cities' ordinances limit fees for savings and loans' deposit and lending services, and are thus preempted by the HOLA deposit and loan-related regulations. CalFed Brief in Opposition at 3, 5, 6, and 7. This argument is a straw man; the ordinances do not address any deposit or lending function. The ordinances prohibit banks from surcharging for the use of their ATMs to access accounts elsewhere. This transaction does not involve making or taking a deposit, or making a loan, from the ATM owner. The ATM merely connects the user to a third party's electronic network, and ultimately to a different bank. Indeed, the ATM surcharge at issue here is never imposed when a savings and loan's ATM dispenses or loans money to its own customers.

California Federal also raises a new argument that the Ninth Circuit did not address: whether a state law restricting ATM fees conflicts with HOLA because it "restricts what federal regulations allow." *Id.* at 7. If anything, this argument – based on an unpublished letter by the Office of Thrift Supervision's Chief Counsel – shows why this Court should grant certiorari and clarify the limits of preemption in this area.

The argument that HOLA regulatory permission implicitly preempts state regulation raises the specter of limitless preemption that concerned the Chief Justice,

Justice Stevens, and Justice O'Connor in their dissenting and concurring opinions in *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 171-72 (1982). There, the Chief Justice and Justice Stevens disputed that "Congress has enabled the Board to insulate federal savings and loans from California mortgage law merely by promulgating a regulation that declares these clauses to be enforceable." *Id.* at 175. Yet California Federal infers preemption from the regulatory permission to charge fees. CalFed Brief in Opposition at 6, 7.

Even the majority in *de la Cuesta* was careful to note that its opinion did not "explore the outer limits" of HOLA preemption because the state law at issue there implicated a federal savings and loan's mortgage lending practices, which were a "critical aspect of its 'operation,' over which the Board unquestionably has jurisdiction." *de la Cuesta*, 458 U.S. at 167. Here, a federal savings and loan's ability to process ATM transactions that link non-customers with different financial institutions through a third-party's electronic network bears no relation whatsoever to its ability to receive deposits or make loans. And as Justice O'Connor wrote in her concurrence in *de la Cuesta*, Congress did not intend HOLA to displace local laws "not directly related to savings and loan practices," and "nothing in the Court's opinion should be read to the contrary." *Id.* at 172.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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